

THE RISE (AND FALL?) OF IMPLIED DUTIES OF GOOD FAITH IN CONTRACTUAL PERFORMANCE IN AUSTRALIA

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I INTRODUCTION

If the 19th century witnessed the ascendancy of the classical theory of contract¹ in a commercial and legal environment in which the freedom of contract was paramount,² then the latter portion of the 20th century saw its substantial demise. By the early 1970s, influential commentators were announcing the death of contract³ and the fall of the freedom of contract.⁴

Predictions of death have proved to be overly dire, but the term 'transfiguration'⁵ may not be too far-reaching. Rather than a sea of certainty, freedom of contract has been aptly described as a 'burgeoning maelstrom'.⁶ In the 20th century, it faced the steady intrusion of doctrines such as unconscionability, estoppel and broader general equitable principles, not to mention legislative influences on the operation or result of contracts.⁷

Despite the prominence of these factors in remoulding the law of contract in Australia, the doctrine of an implied duty of good faith in contractual performance had been largely ignored until the 1990s. Although this doctrine had

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1 Sir Anthony Mason and Stephen Gageler, 'The Contract' in P D Finn (ed), *Essays on Contract* (1987) 1.

2 The epitome of this approach to contract and what it entailed is often said to be reflected in the statement of Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465:

[I]f there is one thing which more than another public policy requires it is that men of full and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.

3 See generally Grant Gilmore, *The Death of Contract* (1974).

4 See generally Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

5 Sir Anthony Mason, 'Contract: Death or Transfiguration?' (1989) 12 *University of New South Wales Law Journal* 1.

6 Justice L J Priestley, 'Contract – The Burgeoning Maelstrom' (1988) 1 *Journal of Contract Law* 15.

7 See, eg, *Contracts Review Act 1980* (NSW); *Trade Practices Act 1974* (Cth), particularly ss 52, 51AA, 51AB, 51AC.

ostensibly figured significantly in the law of contract in the United States ('US') (and continues to do so),⁸ the general view in Australia was that such a doctrine had no application in this jurisdiction.⁹ This is not to say that the broader concept of 'good faith' has been unknown here. On the contrary, legislation such as the *Insurance Contracts Act 1984* (Cth) s 13,¹⁰ the *Bankruptcy Act 1966* (Cth) ss 120–4, the *Trade Practices Act 1974* (Cth) ss 51–2 as well as the *Corporations Act 2001* (Cth) s 181(1) all make reference to the concept. At common law, good faith plays an integral role in contracts *uberrimae fidei*, such as insurance contracts.¹¹ Arguably, contracts of employment also incorporate an expectation of good faith between employers and employees.¹² Good faith is also a doctrine well known in equity. In particular, good faith is expected to prevail in fiduciary relationships.¹³

Irrespective of this, good faith had not recognisably intruded into the world of arms-length commercial contracting in Australia before 1990. This began to change in 1992, with the decision of the NSW Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* ('Renard').¹⁴ In that case, Priestley JA noted in obiter that:

Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States.¹⁵

Less than a decade later, in *Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd* ('Garry Rogers Motors'),¹⁶ Finkelstein J of the Federal Court of

8 For example, in 1918, the New York Court of Appeals stated that 'every contract implies good faith and fair dealing between the parties to it': *Wigand v Bachmann-Bechtel Brewing Co*, 222 NY Rep 272, 277 (1918). The National Conference of Commissioners on Uniform State Law and the American Law Institute, *Revision of Uniform Commercial Code Article 1 – General Provisions* (2002) also specifies good faith in contractual dealings. Section 1-304 says that every 'contract or duty within [the *Uniform Commercial Code*] imposes an obligation of good faith in its performance or enforcement'. The American Law Institute, *Restatement (Second) of the Law of Contracts* (1981) § 205 provides that every 'contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement'. Note that this source is not binding but is viewed as highly persuasive.

9 See David Harland, 'Unconscionable and Unfair Contracts: An Australian Perspective' in Roger Brownsword, Norma J Hird and Geraint Howells (eds), *Good Faith in Contract: Concept and Context* (1999) 243.

10 The statute reflects a much older common law doctrine.

11 Tony Scotford, 'The Insurer's Duty of Utmost Good Faith Implications for Australian Insurers' (1988) 1 *Insurance Law Journal* 83.

12 See, eg, *Wessex Dairies Ltd v Smith* [1935] 2 KB 80; *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 Ch 169; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; *Schindler Lifts Australia Pty Ltd v Debelak* (1989) 89 ALR 275; *Malik v BCCI SA* [1998] AC 20.

13 Sir Anthony Mason, *Cambridge Lectures: Contract and its Relationship with Equitable Standards and the Doctrine of Good Faith* (1993) 35.

14 (1992) 26 NSWLR 234.

15 *Renard* (1992) 26 NSWLR 234, 263–4.

16 (1999) ATPR ¶ 41-703.

Australia stated that 'recent cases make it clear that in appropriate contracts, perhaps even all commercial contracts, such a term will ordinarily be implied; not as an ad hoc term (based on the intention of the parties) but as a legal incident of the relationship'.¹⁷

This article traces the apparent infiltration of implied duties of good faith in contractual performance into the Australian law of contract. An extensive body of literature has grappled with the question of whether such duties are helpful and desirable,¹⁸ and with related questions as to their meaning and content.¹⁹ These issues are not directly addressed in this article. Instead, this article seeks to examine the manner in which the implication of contractual terms requiring good faith in performance gained apparent legitimacy in Australia. It is argued that this has been a confused, ad hoc process. The direct result is that current Australian interpretations of the scope, nature and meaning of such implied terms, not to mention their legitimacy, are uncertain. This represents an unsatisfactory state of affairs, and Australian jurisprudence would be better served by a return to the accepted wisdom of pre-*Renard* days.

The article begins by examining the environment in which good faith emerged in Australian contract law. It then attempts to 'decipher' *Renard*, and argues that the foundations of the doctrine of good faith in Australia are far from stable. Finally, subsequent legal developments, which have not clarified this area, are critically analysed.

II GOOD FAITH AND THE CONSTRICTION OF COMMERCIAL FIDUCIARY LAW

In the 1980s the 'great experiment' of commercial plaintiffs was arguably the claim that fiduciary relationships existed between parties whose dealings would traditionally have been governed solely by the express and implied terms of the contracts between them.²⁰ The impetus for this trend, as with the doctrine of good

17 Ibid ¶ 43 014.

18 See, eg, Horst Lucke, 'Good Faith and Contractual Performance' in P D Finn (ed), *Essays on Contract* (1987) 155; Paul Finn, 'Commerce, the Common Law and Morality' (1989) 17 *Melbourne University Law Review* 87; Sir Gerard Brennan, 'Commercial Law and Morality' (1989) 17 *Melbourne University Law Review* 100; Sir Christopher Staughton, 'Good Faith and Fairness in Commercial Contract Law' (1994) 7 *Journal of Contract Law* 193; Roger Brownsword, 'Good Faith in Contracts Revisited' (1996) 49 *Current Legal Problems* 111; Andrew Phang, 'Tenders, Implied Terms and Fairness in the Law of Contract' (1998) 13 *Journal of Contract Law* 126; Jane Stapleton, 'Good Faith in Private Law' (1999) 52 *Current Legal Problems* 1; Sir Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66; Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions' (2000) 16 *Journal of Contract Law* 1; Andrew Phang, 'Security of Contract and the Pursuit of Fairness' (2000) 16 *Journal of Contract Law* 158.

19 For three different approaches see E Allan Farnsworth, 'Good Faith Performance and Commercial Reasonableness Under the *Uniform Commercial Code*' (1963) 30 *University of Chicago Law Review* 666; Robert Summers, 'Good Faith in General Contract Law and the Sales Provisions of the *Uniform Commercial Code*' (1968) 54 *Virginia Law Review* 195; and Steven J Burton, 'Breach of Contract and the Common Law Duty to Perform in Good Faith' (1980) 94 *Harvard Law Review* 369.

20 Tort has no doubt played a role of (perhaps increasing) importance in regulating such relationships.

faith in contractual performance, could be most readily traced to the jurisprudence of the US. However, by 1996, with the handing down of the High Court's decision in *Breen v Williams*,²¹ it was clear that Australian courts were not entirely receptive to the broadened application of fiduciary concepts which had been witnessed in other jurisdictions.

The decision in *Breen v Williams* was a watershed in the development of Australian fiduciary doctrine. The majority resolutely rejected the notion that fiduciary relationships could be founded on assertion rather than principle. Empirical analysis of accumulated Australian case history since *Breen v Williams* clearly suggests that plaintiffs arguing for the imposition of fiduciary standards outside accepted categories are likely to be disappointed.²²

Although contract rather than fiduciary doctrine is the subject of this article, the hardening of judicial attitudes towards the discovery of fiduciary relationships in non-traditional – particularly commercial – relationships provides a context for the ensuing discussion. Contract has arguably been the traditional core of commercial relationships. Indeed, it has been suggested that firms engaging in economic activity are merely the nexus of a series of contracts.²³ Furthermore, a degree of self-interested dealing, even opportunism, has traditionally been associated with the use of contract as a means for economic exchange. Had the imposition of fiduciary standards of behaviour in commercial contractual settings become an accepted part of Australian jurisprudence, there may have been a profound reconfiguration of the limits of self-interested dealing and opportunism in contractual settings.

Breen v Williams dealt a significant blow to notions that fiduciary law would give effect to such a change. There seems no doubt that the concept of fiduciary obligations and good faith are closely intertwined. The case reaffirmed the notion that fiduciary obligations (to the extent that they could arise in arms-length commercial contractual relationships) would need to mould themselves to the terms of relevant contracts rather than supervening those terms.²⁴ This meant that the importation of good faith or like requirements into commercial contracts would be unlikely to arise through the fiduciary route. The very existence of contracts between commercial actors formed the most substantial component of the barrier.

Thus, rather than attempting to impose requirements of good faith by asserting these supervened contractual considerations, the new path would be to suggest that these obligations were inherent in the contracts themselves. Successfully achieving such an outcome would result in something of a revolution, since generally this had not been the accepted understanding in Australia.

21 (1996) 186 CLR 71, 95.

22 Tyrone Carlin, 'Fiduciary Obligations in Non-Traditional Settings – An Update' (2001) 29 *Australian Business Law Review* 65.

23 Ronald H Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

24 This position was forcefully put by the High Court a decade earlier in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

A A New Path

Given the protean nature²⁵ of the doctrine that was to spring from *Renard*, there is something ironic in the thoroughly pedestrian nature of the dispute in that case. *Renard* revolved around the question of how a principal to a standard-form building contract may exercise the rights granted by the contract. The ratio of the majority's position, if one can be discerned, is that the powers conferred on the principal by the clause in question were to be exercised reasonably.²⁶ This in itself was arguably quite a radical step. It can be contrasted with President Kirby's famous admonition in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*²⁷ against judges substituting the world view generated by their overly tender consciences for the decisions made by hard-headed business people.²⁸

A shift of such proportions invited a response. In 1993, *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney* ('*Hughes Bros*')²⁹ provided such an opportunity. This case was remarkably similar in its facts to *Renard*. It involved yet another standard-form construction contract, and yet another set of arguments that, in asserting rights explicitly conferred by the contract, the principal was subject to an implied duty to act reasonably. In *Renard*, both Priestley and Handley JJA had made their support for this implied term clear.³⁰ Only Meagher JA dissented. In *Hughes Bros*, Kirby P sat with Meagher and Priestley JJA, whose opposing views on the subject were evident in *Renard* and would presumably resurface in *Hughes Bros*.

What view would Kirby P take? He had, after all, previously made vigorous statements which defended the freedom of commercial contractual relationships and stressed the importance of the ability of commercial actors to elaborate the terms of their bargains without undue interference.³¹ In *Hughes Bros* he would effectively hold the balance of power. Depending on his view, the reasonableness doctrine that had been born in *Renard* might not survive its infancy.

In both *Hughes Bros* and *Renard*, the dispute revolved around the same standard-form construction contract. However, the foundation of each dispute related to a separate clause of that standardised contract. It was open to Kirby P to find that the reasonableness doctrine so recently discovered in *Renard* was limited to the particular clause litigated in that case. He did not do so, arguing instead that it was his 'judicial duty' to follow *Renard*, thus bolstering the legitimacy and general applicability of the ratio in the earlier case.³²

Thus, the majority in *Hughes Bros* upheld the reasoning of *Renard*. However, as we shall see, in far too many subsequent references the meaning of *Renard* as

25 To use Professor Lucke's term: Lucke, above n 18, 160.

26 Meagher JA dissented vehemently: *Renard* (1992) 26 NSWLR 234, 272–8.

27 (1989) 16 NSWLR 582, 585–6.

28 Ibid 586. See also *State Rail Authority of NSW v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170, 177; *Trawl Industries of Australia v Effem Foods Pty Ltd* (1992) 27 NSWLR 326, 332, where it was noted that courts should be upholders and not destroyers of commercial bargains.

29 (1993) 31 NSWLR 91.

30 *Renard* (1992) 26 NSWLR 234, 257–60 (Priestley JA), 280 (Handley JA).

31 See above n 28 and accompanying text.

32 Kirby P stated that he applied the doctrine only out of duty and that he felt bound to do so even if he disagreed strongly with the doctrine: *Hughes Bros* (1993) 31 NSWLR 91, 93.

an authority, and of *Hughes Bros* as its first test, seems to have been partly or wholly misconstrued.

III DECIPHERING *RENARD*

The question raised in *Renard* involved the extent to which the exercise of powers expressly conferred by contract can be tempered by the implication of a term requiring reasonableness in their exercise. It was not, per se, a case that revolved around the discovery and imposition of a doctrine of an implied duty of good faith in contractual performance. One could, given subsequent references to the case, be forgiven for reaching a contrary conclusion. For example, it has been subsequently noted that 'the decisions in *Renard Construction* and *Hughes Bros* mean that in New South Wales, a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract'.³³

Similarly, in Victoria, Byrne J has commented that:

As I indicated to counsel in argument, I do not see myself as at liberty to depart from the considerable body of authority in this country which has followed the decision of the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works*. I proceed therefore, on the basis that there is to be implied in a franchise agreement a term of good faith and fair dealing ... such a term is a legal incident of such a contract.³⁴

These extracts reflect a view of *Renard* which is not readily explicable upon an examination of the decision. Although the three members of the Court in *Renard* agreed on the outcome and the orders to be made, they were deeply divided in their reasoning. Meagher JA³⁵ in particular, strenuously rejected the 'reasonableness' approach taken by Priestley and Handley JJA. Reflecting on the injection of this implication into commercial contracts, Meagher JA noted that:

In *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, a majority of this Court, for reasons that they were unable adequately to explain, concluded that such a limitation [an implication of reasonableness] was to be read into [the particular clause]. I dissented.³⁶

Nowhere in Justice Meagher's dissent in *Renard* or the subsequent reiteration of his viewpoint in *Hughes Bros* did he even mention the term 'good faith'. Surely, if 'inflicting' a requirement of reasonableness in the exercise of contractually conferred powers³⁷ was worthy of such strong dissenting language, the same response might reasonably be anticipated in relation to the purported development of implied contractual duties requiring good faith in performance. On this latter point, however, Meagher JA is silent.

33 *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 369 (Sheller JA).

34 *Far Horizons Pty Ltd v McDonalds Australia* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000) [120].

35 *Renard* (1992) 26 NSWLR 234, 272–8.

36 *Hughes Bros* (1993) 31 NSWLR 91, 104.

37 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

Could this be because Meagher JA simply equated the concept of a requirement of reasonableness in the exercise of contractually-conferred powers with the implication of a term requiring good faith in performance? This is unlikely. Even Priestley JA, in his analysis of the good faith doctrine, noted that the concepts of reasonableness and good faith, although they might be seen as coextensive, are nonetheless separate and distinct.³⁸ Furthermore, a significant body of academic literature and case law has consistently distinguished between the two concepts. Lord Devlin, for example, observed that behaviour could be found to be unreasonable notwithstanding the fact that it had been conceived in good faith.³⁹ This approach has survived relatively intact. Contemporary comment on the matter has strongly asserted that the concepts of reasonableness and good faith are distinct, the former imposing a more demanding standard of behaviour than the latter.⁴⁰

An alternative, and more persuasive explanation of Justice Meagher's silence in *Renard* (and later in *Hughes Bros*) on the question of good faith was that he saw no need to comment on the issue because it was peripheral to the Court's decision. Subsequent judicial references to *Renard*, particularly those which cite the case as authority for the existence of an implied duty of good faith in contractual performance, appear to have systematically ignored two key aspects of the New South Wales Court of Appeal's decision. First, only one of three members of that Court, Priestley JA, addressed the distinct issue of good faith. Secondly, and more importantly, Priestley JA explicitly noted that his discussion of good faith did not form part of his reasons for judgment.⁴¹ Clearly, *Renard* is not and cannot be binding authority⁴² for the existence of such terms. Similarly, in *Hughes Bros*, the reasonableness question was a central matter, but the question of implied contractual terms requiring good faith in performance did not factor at all.

As such, it cannot simply be said that *Renard* introduced an implied duty of good faith in contractual performance into Australia. In particular, the foundations of Justice Priestley's discussion in *Renard* (the reference to community standards; the implication of the doctrine by law; and the international examples that Priestley JA drew upon) are questionable. Each of these is examined in turn below.

38 *Renard* (1992) 26 NSWLR 234, 265.

39 *Minster Trust Ltd v Traps Tractor Ltd* [1954] 1 WLR 963, 973.

40 See, eg, Stapleton, above n 18.

41 *Renard* (1992) 26 NSWLR 234, 271. The content of this discussion was largely consistent with his previous extra-curial writings: Priestley, 'Contract', above n 6; Justice L J Priestley, 'A Guide to a Comparison of Australian and United States Contract Law' (1989) 12 *University of New South Wales Law Journal* 4; Justice L J Priestley, 'Conduct After Breach: The Position of the Party Not in Breach' (1991) 3 *Journal of Contract Law* 218.

42 See *Burger King v Hungry Jack's Pty Ltd* [2001] NSWCA 187 (Unreported, Sheller, Beazley and Stein JJA, 21 June 2001) [154] in which Justice Priestley's insights in *Renard* are clearly acknowledged as obiter. However, references to *Renard* have generally been couched as if the case represented binding authority in relation to the implied good faith question: see, eg, below n 89 and accompanying text.

A Community Versus Individual Expectations

A year before *Renard*, the New South Wales Court of Appeal had tussled with the concept of good faith and contract in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* ('*Coal Cliff Collieries*').⁴³ Kirby P, with Waddell AJA concurring, held that a contract to negotiate in good faith was known to the law and, in some circumstances, would be enforceable. This may seem heretical when compared with the strict English doctrine, expressed in *Walford v Miles*,⁴⁴ that good faith has no role to play in precontractual negotiations.⁴⁵ However, President Kirby's decision must be read carefully. His reasoning seems to have been founded on the philosophy that the law should not interfere with the legitimate commercial interests of contracting parties.⁴⁶ Promises that were vague or of an illusory nature would not be recognised.⁴⁷

Coal Cliff Collieries might therefore be seen as a cautious step towards acceptance of a doctrine of good faith relating to precontractual negotiation, where it was clear that this would give effect to the intentions of the parties involved. Although it is necessary to treat doctrines relating to good faith in precontractual negotiation as separate from those relating to good faith in contractual performance, the approach adopted by Kirby P in relation to the former held valuable lessons for the development of the latter.

Unfortunately, because the doctrines have been treated as distinct, very little jurisprudential cross-fertilisation appears to have taken place. The caution which characterised President Kirby's approach in relation to good faith in precontractual negotiations in *Coal Cliff Collieries*, may be contrasted with Justice Priestley's vigorous advocacy of good faith in contractual performance in *Renard*. In *Coal Cliff Collieries*, Kirby P was concerned with giving effect to the nature of the bargain reached between the parties – that is, to uphold their legitimate and express commercial desires.⁴⁸ However, in *Renard*, Priestley JA appealed to a generalised standard of behaviour, arguing that:

[P]eople generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.⁴⁹

43 (1991) 24 NSWLR 1.

44 *Walford v Miles* [1992] 2 AC 128; see also *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297.

45 It has been suggested that in the US, like England, there is no recognised duty of good faith in precontractual negotiations. This is in contrast to the apparent ready acceptance in the US of duties of good faith in contractual performance. See Justice T R H Cole, 'Law – All in Good Faith' (1994) 10(1) *Building and Construction Law* 18, 28.

46 This line of argument has been consistently followed by Kirby P in a range of his decisions on the New South Wales Court of Appeal. See above n 28.

47 *Coal Cliff Collieries* (1991) 24 NSWLR 1, 26–7 (Kirby P).

48 *Ibid.*

49 *Renard* (1992) 26 NSWLR 234, 268.

The expectations that were to be upheld appeared to relate not to the parties who had contracted with each other, but rather, to broader community expectations. This represented a significant shift away from classical contract theory. Nevertheless, the response to *Renard* in the first judicial reference after it was handed down was relatively ambivalent. In *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*,⁵⁰ Giles J described *Renard* as giving rise to the possibility that a duty of good faith might exist in contractual performance, but provided no critique or other comment.⁵¹ Thus far, the nascent doctrine had hardly evoked a blink. However, a more robust response emerged in the comments made by Rogers CJ Comm D in *GSA Group v Siebe PLC* ('*GSA Group*').⁵² There it was held that courts should not imply obligations of good faith and fairness in contractual performance into contractual relationships between commercial parties of equal bargaining power.⁵³

Though largely overlooked in subsequent cases,⁵⁴ *GSA Group* is an important source of background on the subject of good faith in contractual performance. This is not only because the conclusion in relation to the doctrine of good faith in contractual performance formed part of the ratio of the decision (unlike *Renard*), but also because of Rogers CJ Comm D's insightful critique of some of Justice Priestley's assumptions. Referring, for example, to Justice Priestley's assertion of a growing judicial trend towards the recognition and application of good faith and fairness principles into contractual settings, Rogers CJ Comm D noted that:

Against a trend towards a general obligation of good faith ... there have been judicial comments to the effect that the courts should be slow to intrude into the commercial dealings of parties who are quite able to look after their own interests. The courts should not be too eager to interfere in the commercial conduct of the parties, especially where all of the parties are wealthy, experienced, commercial entities able to attend to their own interests.⁵⁵

It was not readily apparent that the judiciary or the community as a whole were ready to accept duties of good faith in contractual performance.⁵⁶ Additionally, Rogers CJ Comm D bluntly observed that the parties in dispute in *GSA Group* were thoroughly adversarial towards each other and had maintained such a stance since the negotiation of the agreement they subsequently sued on. How could this invite a conclusion that either party expected the other to act in good faith? In the view of Rogers CJ Comm D it could not, hence his rejection of the suggestion that he ought to discover such an obligation within the contractual relationship. The core difference in this approach appears to be the focus on the nature of the relationship between the parties, without regard to the model of broader community expectations adopted by Priestley JA.

50 *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

51 *Ibid* 209.

52 (1993) 30 NSWLR 573.

53 *Ibid* 580.

54 The case has only been briefly cited in *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000) [121].

55 *GSA Group* (1993) 30 NSWLR 573, 579.

56 See also Kirby P in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 132–3.

Justice Priestley's concept of 'community standards' was also criticised by the Federal Court of Australia in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* ('*Service Station Association*').⁵⁷ Gummow J was invited to conclude that as a matter of law, a term should be implied into every contract that would require each party to act in good faith and with fair dealing in relation to the contract's performance and enforcement. He declined to do so. Instead, he noted that to imply such a term as a matter of law would be a major step,⁵⁸ which no authority bound him to take.⁵⁹ However, this matter of precedent was not at the core of his decision. Indeed, it was almost a case of *res ipsa loquitur*. Quite clearly there was no such authority and his Honour's mention of the fact should be taken as no more than an aside. Rather, the significance of Justice Gummow's judgment lies in the critique it provides of certain key assumptions implicit in Justice Priestley's exposition of good faith in *Renard*.⁶⁰ This included the concept of 'community standards'. He observed that the 'invocation of "community standards" may be no more than an invention by the judicial branch of government of new heads of "public policy", something long ago regarded as a risky enterprise'.⁶¹

More fundamentally, though Gummow J does not expressly refer to this, it is worth noting that there is a lack of empirical evidence that any such standards or expectations exist.⁶² This has been noted in the literature, with one author labelling the alleged community standards 'imaginary'.⁶³ This is a key weakness, at both a rhetorical and practical level, of the foundation allegedly laid down in *Renard* for the introduction of a doctrine of good faith in contractual performance into the Australian law of contract.

B Terms Expressly Bargained For

A further point of differentiation between the treatment of 'good faith' in *GSA Group* and *Renard* is the approach taken in determining which types of parties, if any at all, ought to be the beneficiaries of such a doctrine. In *Renard*, a highly expansive model was adopted. Duties of good faith in contractual performance were suggested to lurk in all contracts, between all types of contracting parties, be they individuals, large corporations or governments.⁶⁴ Indeed, in justifying

57 (1993) 45 FCR 84.

58 Ibid 97.

59 Ibid 98.

60 The appellant sought to convince the Court that the respondent owed a duty to perform contracts in good faith. The only authorities that appear to have been cited were Justice Priestley's discussion of good faith in *Renard*, and the American Law Institute, *Restatement (Second) of the Law of Contracts* (1981) § 205: ibid 91–6.

61 *Service Station Association* (1993) 45 FCR 84, 92.

62 The same can be said of Justice Finn's invocation of community standards and expectations in *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 191–3.

63 Peter Van den Dungen, 'Good Faith, Unconscionable Conduct and Imaginary Community Standards: Section 51AC of the *Trade Practices Act* and the Insurance Industry' (1998) 10 *Insurance Law Journal* 1, 18.

64 Priestley JA consistently uses language such as 'all contracts' in his discussion of good faith. See, eg, *Renard* (1992) 26 NSWLR 234, 270.

this position, Priestley JA noted the emergence of statutory mechanisms for intervening in contracts that bear the black marks of unfairness, unconscionability and/or bad faith.⁶⁵ For him, this was evidence of an unmistakable trend towards the acceptance of good faith as a doctrine inherent in all contracts.⁶⁶

Rogers CJ Comm D adopted the contrary approach in *GSA Group*. His Honour acknowledged that, particularly in respect of contracts relating to consumers, there is an increasing expectation that fairness (perhaps even good faith) will govern the behaviour of the stronger party. The interests of 'weaker' parties are clearly protected by the existence of strong statutory remedies.⁶⁷ Weaker parties have no need of the protection afforded by implied duties of good faith, because the statutory weapons at their disposal provide a far more potent shield than the common law.⁶⁸

This is the preferable approach. Well-informed commercial parties can be presumed to be competent to fend for themselves. The fact that consumers might be perceived to need statutory or other forms of protection ought not result in the same conclusion for all forms of contractual relationships.⁶⁹ Why generally impose an obligation which might be antithetical to the nature of the relationship between parties,⁷⁰ and which, were it important to those parties, could have been expressly bargained for?

Here a return to the reasoning in *Coal Cliff Collieries* is helpful. The essence of that decision is that there is nothing repugnant in the notion of enforcing contractual terms that have been expressly provided for. This is so even if the result is a reversal of the classical presumption that dealings between parties will be primarily adversarial, or at least potentially so. The proviso is that such terms must be clearly bargained for in the facts of the particular case.

The logical corollary of this proposition seems to be that as long as parties clearly express a desire to perform their contractual obligations in good faith, a

65 His Honour mentions, among others: the *Unfair Contracts Terms Act 1977* (UK), *Money Lenders and Infants Loans Act 1905* (NSW), *Hire Purchase Agreement Act 1940* (NSW), *Hire Purchase Agreement Act 1960* (NSW), *Industrial Arbitration Act 1940* (NSW), *Contracts Review Act 1980* (NSW) and *Trade Practices Act 1974* (Cth).

66 *Renard* (1992) 26 NSWLR 234, 264–8.

67 *GSA Group* (1993) 30 NSWLR 573, 580. For a review of the nature of the impact of the *Contracts Review Act 1980* (NSW) in its first 20 years of operation, including some comment on the ascendancy of other statutory unconscionability provisions such as those contained in the *Trade Practices Act 1974* (Cth), see Tyrone Carlin, 'The *Contracts Review Act 1980* (NSW) – 20 Years On' (2001) 23 *Sydney Law Review* 125.

68 *GSA Group* (1993) 30 NSWLR 573, 580.

69 Another way of putting this argument is that the common law does not proceed too readily from a series of examples to the adoption of a general principle: see Staughton, above n 18, 194.

70 As was found to be the case in *GSA Group* (1993) 30 NSWLR 573.

court should accommodate such an arrangement as far as possible.⁷¹ This is an entirely different proposition however, from suggesting that a duty of good faith in performance will reside in every contract, a point made clear in *GSA Group*.

C Implication at Law

It is also questionable whether the terms of good faith suggested in *Renard* by Priestley JA *can* be implied in contracts as a matter of law, as opposed to an ad hoc implication based on the particular facts of a case.⁷² *Service Station Association* provided Gummow J with an opportunity to reiterate the bases on which terms may be implied into contracts at law.⁷³ First, a term may be implied if it is so much a part of common understanding or practice that the courts import it as a matter of course.⁷⁴ For this to be so, the term must be 'notorious, certain, legal and reasonable'.⁷⁵ Although this does not mean that universal acceptance of a customary term is essential,⁷⁶ it is strongly arguable that at least by 1993, there was no sound foundation for the proposition that a term requiring good faith in contractual performance was 'custom' and hence eligible for implication at law.⁷⁷ There was, in the early 1990s, no body of Australian case law that suggested otherwise, and *Renard* alone could not be said to fill that lacuna.

The second possible methodology for implying a term at law is based on the 'felt necessities of the time',⁷⁸ but not the actual or presumed intention of the

71 In *Renard*, Priestley JA referred extensively to the provisions of the US *Uniform Commercial Code* and to the American Law Institute, *Restatement (Second) of the Law of Contracts* (1981) § 205, which states that every 'contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement'. While that is so, § 205 is subject to a qualification – the parties are free to determine by express agreement what good faith will require or permit of them: see Burton, above n 19, 371–2. Assuming that no common law duty of good faith in contractual performance exists in Australia, this nevertheless lends weight to the argument that if contracting parties wish to adopt such a standard, their desire should be recognised by a court, so long as it is clearly expressed within the contract by which they are bound. Alternatively, if it is the case that a duty to perform in good faith has taken root in the Australian common law, the ability to define the content of that duty should reside with the contracting parties, as it does in the US. That would at least ameliorate some of the fear of uncertainty that has emerged as a result of the arrival of the doctrine of good faith in contractual performance.

72 The legitimacy of this distinction was recognised in *Castlemaine Tooheys Ltd v Carlton United Breweries Ltd* (1987) 10 NSWLR 468, 486–7 (Hope JA). However, the mechanism for implying terms at law still seems the subject of controversy: *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 191–2 (Finn J).

73 *Service Station Association* (1993) 45 FCR 84, 89–90.

74 Ibid 92. Usually this will take place in the context of an informal contract with no written terms – though, of course, the existence of written terms does not preclude implication at law by the courts: J W Carter and D J Harland, *Contract Law in Australia* (3rd ed, 1996) [631].

75 Butterworths, *Halsbury's Laws of England* (4th ed, 1974) vol 9, Contract, '2 Implied Terms' [353]. See also *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48, 61.

76 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226; *Re Palmdale Insurance Ltd* [1982] VR 921, 924–7.

77 Although the concept had been raised a decade earlier in *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 799–801 (McLelland J), it seems to have disappeared from notice until its revival in Justice Priestley's dicta in *Renard* (1992) 26 NSWLR 234, 263–71. It would be a surprising result indeed if a custom could be established within a year by the mere appearance of obiter comments, irrespective of the eminence of the author.

78 *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225.

parties. Rather, 'necessity' seems to refer to a situation where unless a particular term is implied, the enjoyment of rights conferred by the contract would be seriously undermined or rendered worthless.⁷⁹ In *Renard*, Priestley JA argued that the time was ripe for the implication of a duty of good faith in contractual performance into all contracts.⁸⁰ Presuming that, outside special cases, the requirements as to 'custom' were not met, the only residual route available to facilitate this implication would be to satisfy the necessity test. Given that there had been no apparent shortage of contractual activity before the rediscovery of the doctrine of good faith in contractual performance in Australia, nor in jurisdictions where the doctrine is wholeheartedly rejected, it is unlikely that this test would be satisfied. In any event, Gummow J seemed to take this view in *Service Station Association*.⁸¹

D The US Doctrine of Good Faith in Contractual Performance

A final questionable aspect of Justice Priestley's comments in *Renard* is his reference to US jurisprudence. In *Renard*, Priestley JA examined the US approach to the doctrine of good faith in contractual performance. He concluded that, as in the US, many of the conditions precedent to embracing such a doctrine had been fulfilled in Australia.⁸² However, in *Service Station Association*, Gummow J stated that:

[I]n the United States it has been said that the good faith performance doctrine may appear as a licence for the exercise of judicial or juror intuition, resulting in unpredictable and inconsistent applications ... [and that] given the diversity of common law jurisdictions in the United States, it will remain difficult to speak with any certainty of a generally accepted doctrine.⁸³

Although Priestley JA had painted a picture of a relatively benign doctrine, ready for instant transplantation into Australian jurisprudence, Gummow J suggests that this is not the case. There is no common law of the US. Rather, there is a multiplicity of common law jurisdictions, each with its own idiosyncrasies. Furthermore, not all of those jurisdictions have historically displayed the same level of commitment to the doctrine of good faith.⁸⁴ Even if a distinct and uniform doctrine could be said to exist in the US, would that alone support the

79 See especially *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 450 (McHugh and Gummow JJ).

80 *Renard* (1992) 26 NSWLR 234, 268.

81 *Service Station Association* (1993) 45 FCR 84, 98.

82 His Honour argued that both the US and Australia had the same ultimate source for their common law. Academic interest, which had stimulated a broad acceptance of good faith in the US, was increasing in Australia. Also, given the strong focus on open economic trading conditions and the social and political similarities between the two nations, if the US could readily adopt such a doctrine, why not Australia?: *Renard* (1992) 26 NSWLR 234, 267.

83 *Service Station Association* (1993) 45 FCR 84, 92.

84 The doctrine, now espoused in the National Conference of Commissioners on Uniform State Law and the American Law Institute, *Revision of Uniform Commercial Code Article 1 – General Provisions* (2002) § 1-304, has been described as something of a toothless tiger. Within the context of the *Uniform Commercial Code*, determination of whether or not action has been in good faith is largely measured against a subjective standard: Farnsworth, above n 19, 671. This might offer one explanation as to why, as Priestley JA observes in *Renard*, the existence of the doctrine appears to have interfered little, if at all, in the undertaking of business in the US: *Renard* (1992) 26 NSWLR 234, 266.

argument that such a doctrine ought to be adopted in Australia?⁸⁵ There is no reason to believe that this would be so.⁸⁶ Certainly, the decisions of *Renard* and *Hughes Bros* provided no convincing argument that it should.

This analysis suggests that any post-*Renard* enthusiasm for the adoption of an implied duty of good faith in contractual performance ought to have largely dissipated by 1993. Although neither *GSA Group* nor *Service Station Association* flatly rejected the notion of good faith in contractual performance in every instance, they did represent a formidable barrier to the general implication at law of such a term. Regardless of the position with respect to the implication of terms at law, another (admittedly not so far-reaching) possibility remained – implication ‘ad hoc’. As we shall see, this, rather than suggestions of terms implied at law, marked the next phase of the insurgency.

IV LATER DEVELOPMENTS

Notwithstanding the setbacks of the previous year, in 1994 the Full Federal Court provided a limited statement of support for the doctrine of good faith in *Jenkins v NZI Securities* (*‘Jenkins’*).⁸⁷ The dispute concerned the question of whether the respondent had contravened s 52 of the *Trade Practices Act 1974* (Cth) (*‘TPA’*), in relation to representations regarding the term of a loan.

Buried within the otherwise unremarkable text, the Full Federal Court noted that in the event that the extension of a loan facility was subject to a review provision, this review should be conducted in good faith having regard to the interests of both parties.⁸⁸ Both *Renard* and *Hughes Bros* were cited as authority for this proposition⁸⁹ even though, as argued above, their authority was questionable. What makes this reference even more surprising is that it appears to contradict an earlier decision of the Full Federal Court. It was held in *Canberra Advance Bank Ltd v Benny*⁹⁰ that a court ought to exercise considerable caution

85 Certainly in relation to the High Court of Australia’s consideration of the approaches taken to fiduciary law in the US and Canada, and the transplantation of those systems to Australian law, the answer must be no. The High Court has made it plain that it has no interest in adopting ‘unprincipled’ approaches from overseas. Justice Gummow’s suggestion that it was possible that good faith in contractual performance might be seen as a licence for judicial intuition, leading to unpredictable and inconsistent results, seems to be very similar to labelling the doctrine ‘unprincipled’: *Breen v Williams* (1995) 186 CLR 71, 132–8.

86 See generally Tyrone Carlin, ‘Doctors as Fiduciaries – Revisiting the Past With an Eye on the Future’ (2001) 9 *Journal of Law and Medicine* 95, 99.

87 (1994) 52 FCR 572.

88 *Jenkins v NZI Securities* (1994) 124 ALR 605, 619. Note that this discussion is omitted from the official report of the case, *Jenkins* (1994) 52 FCR 572.

89 *Jenkins v NZI Securities* (1994) 124 ALR 605, 619.

90 (1992) 38 FCR 427.

before delving too far into the question of whether a lender's actions (particularly in a commercial lending situation) were reasonable and fair.⁹¹

Given that the reference to good faith in *Jenkins* seems to have been largely by way of an aside, and based on uncertain authority, this case did not provide significant support for the doctrine of good faith in contractual performance.

A An Ad Hoc Sidestep

By the conclusion of 1994, the doctrine of good faith in contractual performance was in the same state of disrepair as it had been at the conclusion of the previous year. However, a reversal of fortune took place in 1996, in the somewhat unlikely context of the battle fought for control of the game of rugby league in Australia.

The essence of the dispute in *News Ltd v Australian Rugby Football League Ltd*⁹² can be described as follows. The Australian Rugby Football League ('ARL') and a range of State-based affiliated leagues had run a high-level rugby league competition. Control of the competition was commercially valuable, particularly given the associated television and merchandising rights. A new competitor, Super League, offered an alternative competition backed by a major media conglomerate. Although the teams affiliated with the ARL competition had signed commitment agreements and entered into loyalty deeds, some nevertheless breached those contracts by releasing players to the alternative competition, shifting their allegiance to Super League, and generally acting in a manner prejudicial to the interests of the ARL.

Express contractual provisions protected the ARL's rights. Participating clubs were required to field teams for the ARL, but could not field teams for any other purpose without ARL approval. This, naturally enough, would rarely (if ever) be forthcoming. This meant that the ARL effectively had a guarantee not only that teams would be made available to play, but also that players contracted to loyal clubs could not be siphoned elsewhere, thus avoiding a reduction in the quality of the competition run by the ARL and hence its commercial attractiveness.

If any protection of the ARL's position in the form of implied terms was needed, then it is arguable that this could be found in an old, but still authoritative, statement of Griffith CJ. In *Butt v M'Donald*⁹³ he found that 'it is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract'.⁹⁴ Instead, the language of good faith was used.⁹⁵

91 The source of the Full Federal Court's reasoning in this case would appear to be the 'commercial certainty' approach favoured by English law. This is exemplified by statements such as those of Lord Reid in *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 429–30, and, two decades later, those of Lord Wilberforce in *Bunge Corporation New York v Tradax Export SA, Panama* [1981] 1 WLR 711, 715.

92 (1996) 58 FCR 447.

93 (1896) 7 QLJ 68.

94 Ibid 70–1. For an earlier construction of the same rule, see *Mackay v Dick* (1881) 6 App Cas 251, 261 where Lord Blackburn notes that:

Allegations were made that in addition to the express terms of the contract, each club that contracted to play in the ARL competition impliedly promised to act in good faith and to deal fairly with the ARL.⁹⁶

The Federal Court, while sympathetic to the ARL's arguments, noted the controversy that surrounded the question of the existence of a general contractual obligation of good faith.⁹⁷ If *Renard* had been the foundation of such a notion, then *Service Station Association* had certainly muddied the waters. This left the Court in a quandary. With no clear precedent supporting the general implication of such a term, and a significant body of case law (including previous Federal Court decisions) suggesting that no such implication should be made, to find that a duty of good faith in contractual performance should be implied at law would be fraught with danger. To do so would traverse unknown legal territory.

The Federal Court avoided this danger by declaring the contract that had existed between the ARL and the clubs participating in its competition to be a special type of contract. A term demanding good faith in contractual performance was required on the facts.⁹⁸ The issue of good faith had raised its head once more, but – as Finn J would subsequently note⁹⁹ – indecisively so. The Court had avoided reaching a conclusion on whether or not the implication at law of a duty of good faith in contractual performance was recognised in Australian law. At best, good faith may have found itself a new and narrow niche in the law – that is, in special types of contracts.¹⁰⁰ However, nothing material had changed as a result of this case.

[A]s a general rule ... where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

This approach is still authoritative in Australia: see *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596, 607–8 (Mason J).

95 It should be noted that there is some support for the proposition that the dictum of Griffith CJ in *Butt v M'Donald* (1896) 7 QLJ 68, 70–1 has essentially the same content as the doctrine of good faith in contractual performance. Thus in *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766, 799–801, McLelland J considered that the good faith requirement contained in the American Law Institute, *Restatement (Second) of the Law of Contracts* (1981) § 205 did not demonstrate any material divergence from the rule set out by Griffith J in *Butt v M'Donald*. However, McLelland J was quite restrictive in making such a characterisation. He noted, for example, that the requirement of good faith extended only to the performance of the express terms of the contract, and may not be used as a springboard for other implied terms. Arguably, the doctrine supported by Priestley JA in *Renard* went beyond these restrictive limits.

96 *News Ltd v Australian Rugby Football League Ltd* (1996) 58 FCR 447, 540–1.

97 *Ibid* 541.

98 *Ibid*.

99 *Hughes Aircraft Systems* (1997) 76 FCR 151, 192.

100 It is arguable that the basis on which the requirement of good faith was implied may be subjected to the same criticism directed at international decisions which have imposed fiduciary relationships in novel situations to construct a certain outcome. This has been described as 'remedial abuse': Rosemary Teele, 'The Search for the Fiduciary Principal: A Rescue Operation' (1996) 24 *Australian Business Law Review* 110, 112.

B Implication At Law

In 1997, the debate on good faith was revived in *Hughes Aircraft Systems International v Airservices Australia* ('*Hughes Aircraft Systems*').¹⁰¹ This case arose out of a complex government tender for the provision of an advanced air traffic control system. Finn J embraced the implication by law of terms requiring good faith in the performance of contractual obligations.¹⁰² His judgment has been seen as strengthening the legitimacy of the doctrine which initially appeared in *Renard*.¹⁰³

However, to accord *Hughes Aircraft Systems* this legitimising role is mistaken. It is difficult to say that it represents binding authority for the existence of generally implied terms requiring good faith in contractual performance. At best, *Hughes Aircraft Systems* may be interpreted as authority for the proposition that in certain (perhaps all) government tender contracts, a term requiring good faith in the administration of the tender process will be implied. More narrowly, *Hughes Aircraft Systems* might be seen as an occasion in which the Court saw fit to imply a term requiring good faith in light of the particular facts of the case and on those facts alone. There is no reason to believe that the ratio of this case has any broader application. To understand why this is so, it is necessary to refer to the structure of Justice Finn's reasons.

The distinction between the ad hoc implication of terms and the implication of contractual terms at law is strictly made throughout Justice Finn's reasoning. Discussion of each is severed and treated in distinctly labelled sections of his Honour's judgment, with ad hoc implication being discussed before implication at law.¹⁰⁴ Importantly, by the end of the section dealing with ad hoc implication, Finn J reaches the conclusion that, on the facts, it is appropriate to imply a term requiring good faith. This entire discussion is confined to approximately one page. The tone of this section leaves the reader in no doubt that whatever difficulties one might perceive as being associated with the task of implying terms ad hoc, his Honour had no hesitation whatsoever in doing so in this case.

Curiously, given the highly confident tone adopted by Finn J during his consideration of the ad hoc implication of terms, the discussion of the implication of terms at law is said to be 'strictly unnecessary', and mentioned only should his 'previous conclusion be incorrect'.¹⁰⁵ Regardless of how learned the discussion of implication at law contained in the case is, its function is plainly ancillary. On

101 (1997) 76 FCR 151.

102 See *ibid*, 192–3, where Finn J states: 'I should add that, unlike Gummow J, I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are expected to adhere throughout the lives of their contracts'.

103 *Hughes Aircraft Systems* is cited as authority for the proposition that duties of good faith in contractual performance should be implied in contracts at law in: *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Garry Rogers Motors* (1999) ATPR ¶ 41-703; *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; *Hungry Jack's Pty Ltd v Burger King Corporation* [1999] NSWSC 1029 (Unreported, Rolfe J, 5 November 1999); *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000).

104 *Hughes Aircraft Systems* (1997) 76 FCR 151, 190–1 (implication ad hoc), 191–8 (implication at law).

105 *Ibid* 191.

Justice Finn's own characterisation it appears to be obiter, just as Priestley JA characterised his discussion of good faith in *Renard* as obiter.

Despite this, there seems no doubt that Finn J was just as convinced that implication at law was appropriate in this case as he had been in relation to the ad hoc implication of a duty of good faith in contractual performance. However, the question remains whether that strength of conviction easily translates into a more general source of authority. A careful analysis of his Honour's reasons in *Hughes Aircraft Systems* suggests not.

When contemplating the question of the general implication at law of terms requiring good faith in contractual performance, Finn J was faced with a previous decision of the Federal Court¹⁰⁶ in which it had been clearly held that no such general implication (at law) was appropriate. Of course, *Renard* contained the skeleton of an alternative framework,¹⁰⁷ but there was no basis on which to argue that *Renard* represented anything more than the hopeful explication of a view contrary to the prevailing doctrinal approach.

The tension between these two approaches clearly troubled Finn J. He noted that if the matter in question stood merely as a choice between two conflicting views, he would adhere to the position taken by Gummow J in *Service Station Association*.¹⁰⁸ One might, as the result of such a statement, expect a detailed explanation of why the choice was not merely between one of two conflicting views. Such an explanation was not forthcoming. Instead, the discussion of good faith revolved around two key themes: a neo-internationalist rationale for the adoption of a doctrine of good faith, and a discussion of the significance of the fact that one of the parties to the contract was a government instrumentality.

Under the neo-internationalist approach, it is asserted that an approach adopted in foreign jurisdictions might be profitably compatible with the domestic legal system. A basic flaw in this approach is that it is inherently normative. The fact that a particular concept has been implemented in another jurisdiction, while undoubtedly of interest as domestic law develops, cannot of itself be authoritative. There are very strong reasons to suggest that a cautious rather than an aggressive approach ought to inform the application of concepts derived from foreign jurisdictions to an Australian setting. Heed must be taken of Sir Anthony Mason's warning that American case law is 'a trackless jungle in which only the most intrepid and discerning Australian lawyers should venture'.¹⁰⁹ A similar sense of caution has been signalled in several recent Australian decisions,¹¹⁰ including decisions of the High Court.¹¹¹

106 *Service Station Association* (1993) 45 FCR 84.

107 See *Hughes Aircraft* (1997) 76 FCR 151, 192 where Finn J states: 'it is appropriate to indicate that my own view inclines to that of Priestley JA'.

108 This would accord with the authority on the subject of comity – see, eg, *Bank of Western Australia Ltd v FCT* (1994) 55 FCR 233; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; *Bradley v Armstrong* (1981) 39 ALR 118.

109 Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 108.

110 See, eg, *News Ltd v Australian Rugby Football League* (1996) 64 FCR 410, 538. See also *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR ¶ 14 685.

111 See especially *Breen v Williams* (1996) 186 CLR 71, 95 (Dawson and Toohey JJ).

The argument that the approach of another jurisdiction should be adopted domestically is fundamentally centred on a value judgment that the alternative methodology is preferential to the incumbent. It is not possible to transform a value judgment into something other than a value judgment, which is what would be required to avoid the comity problem that it presents, by merely referring in detail to international jurisprudence.

It is possible to be quite precise about the nature of the value judgment that Finn J made in this case. Faced with a choice between the traditional English approach that guided Gummow J in *Service Station Association*, and the approach adopted in the US, he indicated his preference for the latter.¹¹² Viewed at this level, subsequent appeals to *Hughes Aircraft Systems* as an authority in preference to *Service Station Association* are appeals to Justice Finn's personal preferences, rather than to any systematically developed pattern of precedent.

The difficulties in generalising *Hughes Aircraft Systems* do not stop at that point – if anything they multiply as the decision proceeds. If any one factor apart from a general accord with the US approach can be said to have informed Justice Finn's decision, it would seem to be the fact that the principal to the contract in question was a public authority.¹¹³ In Justice Finn's view, a number of consequences flowed from this. First, the self-interest of a public instrumentality is constrained by its need to serve the public interest. The need to act in accordance with public interest, in Justice Finn's view, was consistent with the application of standards of fairness and good faith to the contractual dealings entered into by such bodies.¹¹⁴ Secondly, the expectation of such a standard of behaviour from government is elementary and instinctive. Thirdly, not only are such expectations instinctive and elementary, but it is well settled that the Crown is expected to exercise the highest standards when dealing with its subjects.¹¹⁵

Thus for Finn J, the specific nature of the principal was of great importance to his conclusion that standards of good faith and fairness were reasonably to be implied in the contract. The persuasiveness of such an approach is reduced palpably when one contemplates a situation in which only well-informed commercial parties are involved. Even where that is not so, and a government instrumentality is involved, it is possible to point at gaps in Justice Finn's analysis. In developing his framework of expectations as to the standards of contractual behaviour to be observed by governments, Finn J relied heavily on *Melbourne Steamship Co Ltd v Moorehead* ('*Melbourne Steamship*'),¹¹⁶ a case decided in 1912.¹¹⁷ There seems no reason at all to doubt the authority of that decision, but the insight it offers may be of limited assistance. The very nature of government and its operations has shifted dramatically in the last decade, not to mention since World War One.

112 See *Hughes Aircraft Systems* (1997) 76 FCR 151, 192 where Finn J contrasts the basis of his approach with that of Gummow J in *Service Station Association* (1993) 45 FCR 84, 96.

113 *Hughes Aircraft Systems* (1997) 76 FCR 151, 195–8.

114 *Ibid.*

115 *Ibid.*

116 (1912) 15 CLR 333.

117 *Hughes Aircraft Systems* (1997) 76 FCR 151, 196.

The behavioural standards elaborated in *Melbourne Steamship* had dealings between the 'Crown' and its 'subjects' in mind. It is questionable whether those are the appropriate foundations for the consideration of required standards of behaviour in purely commercial contracts which simply happen to be made with an entity ultimately controlled by the state. It is unlikely that a company such as Hughes Aircraft Systems International slots easily into the role of 'subject'. Similarly, a government trading enterprise, particularly one partly owned by the private sector,¹¹⁸ does not sit easily with the term 'Crown'.

More broadly, the argument that behavioural standards are driven by the nature of an organisation, rather than by a contractual context, is both unconvincing and dangerous. If this was the case, the reasoning in *Hughes Aircraft Systems* would suggest that all organisations ultimately controlled by government would be at a contractual disadvantage (no matter how subtle) to private sector counterparties, even where the contract was undoubtedly at arms-length and commercial in nature. Does it satisfy the public interest to engender and institutionalise such a disadvantage? Whatever cause for complaint one might have in respect of the use of commercialisation and outsourcing as a cloak to accountability,¹¹⁹ it hardly seems appropriate to disrupt the contractual mechanisms used to implement such techniques by requiring a different standard of behaviour of one equally balanced party than another.

In order for *Hughes Aircraft Systems* to lay the foundation for an implied term of good faith in contractual performance, several traps would need to have been avoided. The imposition of a duty of good faith required greater justification than mere judicial value judgment. However, this was not forthcoming. Similarly, there was silence when a rationale for the rejection of a comity-based approach was required. Where justifications for an implied duty of good faith standard were forthcoming, they were based on standards for government dealings created at a time when the nature of such dealings differed vastly from those of today, both in terms of magnitude and level of commerciality.¹²⁰ Furthermore, it is not clear how such prescriptions, even if their validity had not been impeached by the passage of time, clearly or necessarily extend to commercial dealings in the private sector.

Despite these objections, *Hughes Aircraft Systems* has been treated – in much the same way as *Renard* – as 'authority' for implying a term of good faith performance at law. These shortcomings have left the doctrine vulnerable to future attack.

V THE POSITION SINCE HUGHES AIRCRAFT SYSTEMS

What can be said of cases concerning duties of good faith in contractual performance since *Hughes Aircraft Systems*? Six observations seem pertinent.

118 Telstra, in its present incarnation, is a prime example of this.

119 See generally Mark Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40.

120 *Hughes Aircraft Systems* (1997) FCR 151, 195–8.

First, the cases that accept the existence of such a requirement as binding¹²¹ tend to do so using *Hughes Aircraft Systems* and *Renard* as articles of faith.¹²² In the limited number of cases which have devoted a significant amount of space to considering the question of good faith, previous decisions have been cited without sufficient critical analysis.¹²³ There has been little, if any, attempt to meaningfully develop or explore the doctrine of good faith in contractual performance since 1997.¹²⁴

Secondly, a significant number of the cases that have drawn on the doctrine since *Hughes Aircraft Systems* have been the result of franchising disputes. One view is that the nature of the franchise relationship and the special and close interdependencies¹²⁵ associated with franchising may lend themselves to the application of a doctrine such as good faith in contractual performance. However, even if well suited to the class of contracts that one might label 'franchise agreements', the doctrine may well have been made redundant in those contexts by case law that suggests that s 51AC of the *TPA* may be interpreted widely and vigorously. Section 51AC of the *TPA* effectively creates a statutory unconscionability scheme for the protection of small businesses.¹²⁶ The vast majority of franchise operations would fall into this category, which has a broader operation than the equitable doctrine of unconscionability. *Australian Competition and Consumer Commission v Simply No-Knead (Franchising) Pty Ltd*¹²⁷ confirmed that the dimensions of the equitable doctrine would not limit determinations of unconscionability under the *TPA*. Therefore, a far greater range of questionable behaviour would appear to have been brought within the scope and control of the *TPA*. Since the *TPA* makes provision for a range of statutory remedies which may be more appealing than those associated with the equitable doctrine or the remedy for contractual breach, it may be more profitable for franchise disputes to be pleaded according to the terms of the *TPA*.

121 Some do not. In *Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd* [2000] NSWSC 433 (Unreported, Simos J, 26 May 2000), Simos J felt that it was not appropriate even to proceed towards a contemplation of the existence and nature of an implied term requiring a duty of good faith in contractual performance. The basic conditions for implication of such a term, set down in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 had not been met.

122 See, eg, *Garry Rogers Motors* (1999) ATPR ¶ 41-703; *Hungry Jack's Pty Ltd v Burger King Corporation* [1999] NSWSC 1029 (Unreported, Rolfe J, 5 November 1999); *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000); *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 (Unreported, Windeyer J, 26 July 2001).

123 An example of where such an approach is taken is *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349.

124 See, eg, *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94 (Unreported, Malcolm CJ, Wallwork and Steytler JJ, 23 April 2002). Rather than turning their minds to the question of whether such terms ought to be implied, the Full Court of the Supreme Court of Western Australia simply proceeded on the basis that they were indeed implied. The Court then considered the issue of whether a breach could be demonstrated and what remedial action would be appropriate were such a breach proven.

125 For a recent judicial discussion of the nature of the franchise relationship see *Dymocks Franchising Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [1999] 3 NZLR 239.

126 Relief under the *Trade Practices Act 1974* (Cth) s 51AC is not available to listed public companies or in respect of transactions to a value in excess of A\$3 million.

127 (2000) 104 FCR 253.

Thirdly, it is interesting to note that post-*Hughes Aircraft Systems*, plaintiffs relying on the existence of an implied term requiring good faith in contractual performance have not met with considerable success. While convincing courts that such a term exists may be relatively simple, demonstrating that this term has been breached is far more difficult. In the numerous cases¹²⁸ concerning the existence and breach of such an implied term that have been decided since *Hughes Aircraft Systems*, courts have been convinced of the existence of a breach only once. In that case, *Hungry Jack's Pty Ltd v Burger King Corporation*,¹²⁹ the facts included an extraordinary web of deceit and intrigue. While it appears that the courts have accepted the doctrine, there has been a reluctance to use it to provide relief where relief would not otherwise be available.

Fourthly, it is interesting to note that there has been continued judicial resistance to the implication of terms of good faith in contractual performance, even though many courts appear convinced that they are bound to find that such a doctrine is currently operative in Australia. In *Commonwealth Bank of Australia v Milder Elfman Szmeling Krycer Pty Ltd*¹³⁰ the Court was openly hostile to the argument that a duty of good faith between borrower and lender should modify the latter's discretion to appoint a receiver. Meanwhile, in *Advance Fitness Corporation Pty Ltd v Bondi Diggers Memorial & Sporting Club Ltd*,¹³¹ the Court indicated that it did not feel inclined to develop such a doctrine. In *Hungry Jack's Pty Ltd v Burger King Corporation*,¹³² the New South Wales Supreme Court suggested that it could not ascertain the justification for the assumption that terms requiring good faith in contractual performance ought to be implied, but nevertheless felt bound to do so.¹³³

Most significantly, in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*¹³⁴ at least two members of the High Court expressed disquiet in relation to the manner in which the law had developed, though the Court did not consider the case an appropriate forum for a detailed consideration of what was acknowledged to be an important issue.¹³⁵ While Callinan J noted

128 *Commonwealth Bank of Australia v Milder Elfman Szmeling Krycer Pty Ltd* [1998] (Unreported, Supreme Court of Victoria, Hansen J, 18 February 1998); *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Advance Fitness Corporation Pty Ltd v Bondi Diggers Memorial and Sporting Club Ltd* [1999] NSWSC 264 (Unreported, Austin J, 30 March 1999); *Garry Rogers Motors* (1999) ATPR ¶ 41-703; *Hungry Jack's Pty Ltd v Burger King Corporation* [1999] NSWSC 1029 (Unreported, Rolfe J, 5 November 1999); *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 (Unreported, Byrne J, 18 August 2000); *Asia Television Ltd v Yau's Entertainment Pty Ltd* (2000) 48 IPR 283; *Saxby Bridge Mortgages Pty Ltd v Saxby Bridge Pty Ltd* [2000] NSWSC 433 (Unreported, Simos J, 26 May 2000); *Central Exchange Ltd v Anaconda Nickel Ltd* (2001) 24 WAR 382; *Apple Communications Ltd v Optus Mobile Pty Ltd* [2001] NSWSC 635 (Unreported, Windeyer J, 26 July 2001); *Central Exchange v Anaconda Nickel Ltd* [2002] WASCA 94 (Unreported, Malcolm CJ, Wallwork, Steytler JJ, 23 April 2002); *Overlook v Foxtel* (2002) ATPR (Digest) ¶ 46-219.

129 [2001] NSWSC 197 (Unreported, Master Macready, 5 March 2001).

130 [1998] (Unreported, Supreme Court of Victoria, Hansen J, 18 February 1998).

131 [1999] NSWSC 264 (Unreported, Austin J, 30 March 1999).

132 *Hungry Jack's Pty Ltd v Burger King Corporation* [1999] NSWSC 1029 (Unreported, Rolfe J, 5 November 1999).

133 *Ibid* [431].

134 (2002) 186 ALR 289.

135 *Ibid* 312.

the possibility that the implication of terms at law requiring good faith in contractual performance might restrict otherwise legitimate commercial decision-making, on the facts he did not have to address the matter in any detail.¹³⁶ However, Kirby J suggested that the implication of such a term appeared to conflict with the fundamental notions of caveat emptor that are inherent in common law conceptions of economic freedom. He also observed that there appeared to be an inconsistency between the manner in which the law relating to the implication of such terms had developed, and the accepted rules governing the implication of terms into contracts.¹³⁷ If these attitudes prevail when the High Court decides to re-examine the question, a significant change in the direction in the development of the law may result.

Fifthly, the decisions that purport to deal with good faith demonstrate a growing tendency to merge the terms 'reasonable', 'good faith' and 'fair dealing' as if they are homogenous in meaning and content. In *Hughes Aircraft Systems*, Finn J commenced his discussion of implied terms using the label 'good faith', but largely referred to 'fair dealing' thereafter. Arguably, the former is more subjective in its content, and the latter more objective. Certainly there seems no reason to equate the two. Yet many of Justice Finn's reasons for suggesting the existence of an implied term requiring good faith in contractual performance were founded on the assertion that fair dealing is an expected facet of business interaction in the present climate.¹³⁸ That may be so, but whether it logically follows that one may be conjured by invoking the other is a separate question.

Cases such as *Alcatel Australia Ltd v Scarcella*¹³⁹ and *Garry Rogers Motors* also appear to fall into the trap of equating reasonableness with good faith. Both of these cases cite *Renard* as authority for the existence of an implied term requiring good faith,¹⁴⁰ although *Renard* is authority for the notion that a principal should exercise powers conferred by a contract reasonably. Further, there seems to be confusion as to whether good faith will be demonstrated by the absence of bad faith¹⁴¹ or by the commission of reasonable acts.¹⁴² Most recently, courts in some jurisdictions appear to have accepted that no clarification of this matter is likely for the moment, and have therefore attempted to resolve questions put before them with reference to multiple constructions of the concepts of good faith and reasonableness.¹⁴³ The consequence of this lack of clarity is that decision-makers have been unable to define precisely whether the standard of behaviour required of contracting parties is one of 'reasonableness',

136 Ibid 327.

137 Ibid 312.

138 *Hughes Aircraft Systems* (1997) FCR 151, 195.

139 (1998) 44 NSWLR 349.

140 *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, 363; *Garry Rogers Motors* (1999) ATPR ¶ 41-703, 43 014.

141 This approach is favoured by Finkelstein J in *Garry Rogers Motors* (1999) ATPR ¶ 41-703, 43 014, who suggested that to act in good faith meant to not act capriciously.

142 See, eg, *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236 (Einstein J).

143 *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94 (Unreported, Malcolm CJ, Wallwork and Steytler JJ, 23 April 2002).

'good faith' or perhaps both.¹⁴⁴ We may be at a point where there is begrudging acceptance of the existence of some form of doctrine, but recent cases suggest that there is a good deal of confusion as to the content and meaning of that doctrine.¹⁴⁵

Finally, the approach taken regarding the implication of terms requiring good faith in contractual performance appears to have fractured along jurisdictional lines. In New South Wales,¹⁴⁶ it seems that it is accepted that such terms are a legal incident of commercial contracts. In the Federal Court the opinions expressed in relation to whether such a term ought to be implied generally as a matter of law have been contradictory.¹⁴⁷ In Western Australia, recent cases have expressed uncertainty as to whether implication at law of such terms now represents an accepted part of the law and have avoided being mired in the debate, preferring to circumnavigate the issue.¹⁴⁸ Meanwhile in Queensland, there appears to be little (if any) recognition of implied terms requiring reasonableness or good faith in contractual performance.¹⁴⁹ While at a technical level there is no doubt that there is a capacity for a degree of trans-jurisdictional heterogeneity,¹⁵⁰ the degree to which differences in approach have developed in Australia derogates from certainty to an undesirable degree.

VI CONCLUSION

Given the tortured development of the doctrine of good faith in contractual performance in Australia, the hallmark of which seems to have been misconstruction heaped upon misconstruction, this confused state of affairs is hardly surprising. Notwithstanding the strong support for the general implication of a duty of good faith in contractual performance in Australia, there are serious questions about the degree to which the doctrine as it now appears to operate has legitimate and principled origins. One need only have regard to the current confusion as to the appropriate terminology to be selected for the purpose of describing and defining this new doctrine to see the potential for unease and an ongoing lack of clarity in this area of the law. This is arguably the very lack of certainty that advocates of a traditionalist perspective seek to avoid by urging caution in the adoption of new doctrines.

144 See *Hungry Jack's Pty Ltd v Burger King Corporation* [2001] NSWSC 197 (Unreported, Master Macready, 5 March 2001).

145 Some members of the judiciary remain adamant that good faith is not synonymous with reasonable behaviour. See *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236, 256 (Einstein J).

146 *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349; *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187; *Overlook v Foxtel* (2002) ATPR (Digest) ¶ 46-219.

147 *Contrast Service Station Association* (1993) 45 FCR 84 with *Hughes Aircraft Systems* (1997) 76 FCR 151. For more recent examples of similar conflict, contrast *Garry Rogers Motors* (1999) ATPR ¶ 41-703 with *Asia Television Ltd v Yau's Entertainment Pty Ltd* (2000) 48 IPR 283.

148 *Central Exchange Ltd v Anaconda Nickel Ltd* (2001) 24 WAR 382; *Central Exchange Ltd v Anaconda Nickel Ltd* [2002] WASCA 94 (Unreported, Malcolm CJ, Wallwork, Steytler JJ, 23 April 2002).

149 *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346; *Re Zurich Australian Insurance Ltd* [1999] 2 Qd R 203.

150 *R v Parsons* [1983] 2 VR 499; *Cook v Cook* (1986) 162 CLR 376.

The most recent case law in this area, as we have seen, has demonstrated the profound difficulty of breathing precise meaning into terms such as good faith, and distinguishing them from similar terms such as reasonableness. One can hardly lament, however, that this was a state of affairs entered into without warning. The fact that the literature on the topic of good faith demonstrates such remarkable schisms as to the meaning of basic terms¹⁵¹ should have served as a warning that such debates might ultimately transplant themselves from the journals to the law reports, with untold consequences. Does requiring good faith proscribe behaviour in bad faith or prescribe behaviour in good faith? Is the test subjective or objective? If it is the latter, what distinguishes it from a doctrine requiring reasonable behaviour in the exercise of powers?¹⁵²

Unfortunately, the notions of good faith performance that have developed in Australia since the early 1990s have not even reached the stage where these questions, which have resonated through academic literature for several decades, can be posed at anything more than a speculative level. Instead, it is argued that good faith is required because it is a worthy ideal; because the community expects that it should be; because it marries well with the jurisprudence of another jurisdiction; or, worst of all, because the value judgment of someone else has previously asserted that it should be so. In doing so, the other side of the debate is ignored. Questions regarding the workability of attempting to impose such a standard of behaviour on commercial actors, whose actions deny that they expect their counterpart to act in good faith or that they in turn would do the same, have been obscured. Those who have been prepared to query the nature and content of the 'community standards' that have appeared to be so important in informing the need for this new doctrine have been ignored, and scant regard has been paid to the appropriate use of precedent.

It has not been the purpose of this article to suggest that a requirement of good faith ought never be imported into Australian contract law, nor that precedent should be adhered to so strictly as to be unresponsive to the changing needs of those served by the law. Rather, it has been argued that the construction of a new doctrine must be founded on more than just value-laden assumptions and assertions, lest it later be found to be structurally deficient. Arguably, structural deficiency lurks in almost every stone of the edifice currently labelled the doctrine of 'good faith' in contractual performance. Whether these deficiencies are sufficiently material to warrant a wholesale reconsideration of the issue may only be revealed when the High Court has cause to fully consider the issue. All that can be said with certainty is that this doctrine, so rapidly established, is at risk at being discredited with equal expedition.

151 See above, nn 18–19.

152 For a detailed examination of similar debates, see Elisabeth Peden, 'Cooperation in English Contract Law: To Construe or Imply?' (2000) 16 *Journal of Contract Law* 56.